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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1974

No. 74-1596

COLD CREEK LAND AND CATTLE CO.,
Petitioner,

vs.

FRANKLIN V. C. JONES AND MARION JONES,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI
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Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled matter on April 17, 1975.

CITATIONS TO OPINIONS BELOW

The orders entered by the District Court for the Northern District of California which were appealed to the Court of Appeals for the Ninth Circuit are

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not reported. They are printed in Appendix "A" hereto.

The opinion of the Court of Appeals for the Ninth Circuit is printed in Appendix "B" hereto, and is unreported.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on April 17, 1975, and is printed in Appendix "B" hereto, infra, p. viii. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTES AND RULES INVOLVED

The sole statutory provision involved herein is Bankruptcy Act §39c, 11 U.S.C. §67c.

Said statute in part relevant states:

> A person aggrieved by an order of a referee may, within ten days after the entry thereof or within such extended time as the Court upon petition filed within such ten day period may for cause shown allow, file with the referee a petition for review of such order by a judge and serve a copy of such petition upon the adverse parties who were represented at the hearing. Such petition shall set forth the order complained of and the alleged errors in respect thereto.

The sole rule provision involved herein is rule 810 of the Rules of Bankruptcy Procedure.

Said rule states:

> Upon an appeal the District Court may affirm, modify, or reverse a referee's judgment or order,

or remand with instructions for further proceedings. Court shall accept the referee's findings of fact unless they are clearly erroneous, and shall give due regard to the opportunity of the referee to judge the credibility of the witnesses.

STATEMENT OF THE CASE

Petitioner is the purchaser of real property in a bankruptcy proceeding pending in the United States District Court for the Northern District of California. The order confirming sale of said real property to petitioner entered by the bankruptcy judge was reversed on appeal by a District Court judge for the United States District Court for the Northern District of California, and such reversal was upheld by the April 17, 1975, judgment of the Court of Appeals for the Ninth Circuit which is printed in Appendix "B" hereto.

The facts of the case are as follows:

Franklin V. C. Jones and his wife, Marion Jones, respondents, filed on August 18, 1972, at Eureka, California, their petitions for a real property arrangement under Chapter XII of the *Bankruptcy Act*. The principal assets of the debtors consisted of various parcels of valuable real property situated in the Counties of Mendocino and Monterey, State of California. The obligations of the debtors approximated $600,000.00, most of which was and is secured by encumbrances on the real property in question. The debtors' plan of arrangement proposed to creditors with the filing of their Chapter XII petitions con-

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sisted of the hoped for consummation of the allegedly pending transactions with their real property which hopefully would generate enough cash to either pay their creditors in full or at least bring their debt servicing current. At the time the debtors filed their Chapter XII petitions all of their secured obligations were in default and they had theretofore filed Action No. 33102 in the Superior Court of the State of California in and for the County of Mendocino in an attempt to restrain pending foreclosure sales. The State Court refused to restrain and the debtors filed their Chapter XII petitions in order to obtain the automatic restraining order afforded by §428 of the *Bankruptcy Act,* 11 U.S.C. §828.

The Chapter XII proceedings were referred for hearing to the Honorable Conley S. Brown, Bankruptcy Judge, then referee in bankruptcy, on August 23, 1972. After a number of hearings before Judge Brown it became apparent that a Chapter XII proceeding was not feasible and the Court on October 18, 1972 entered its orders adjudicating the debtors bankrupts. The Orders of Adjudication have long since become final.

William B. Grover was appointed trustee in bankruptcy in the estates of the bankrupts and title to the bankrupts' real property vested in said trustee pursuant to §70a of the *Bankruptcy Act,* 11 U.S.C. §110.

The holder of the first deed of trust of the real property filed a petition with the court whereby it requested authorization to proceed with its fore-

closure action which was pending when the Chapter XII proceedings were commenced. The reclamation petition came on for partial hearing on December 13, 1972, and, after the taking of evidence by the court, was continued for further hearings until January 18, 1973. At the December 13, 1972 hearing, evidence was adduced regarding the value of the real property in question. The secured creditors' appraiser appraised the property at $745,000.00. The trustee's appraisal, on the other hand, valued the property at $2,300,000.00 if sold slowly over a long period of time, and at $1,380,000.00 if liquidated.

As a consequence of the court's indication at the December 13, 1972 hearing it was reluctant to continue the restraint of the secured creditor from foreclosing, trustee filed on December 26, 1972, the Petition for Sale of Real Property and the court on said date sent its Notice of Proposed Sale of Real Property to all creditors of the bankrupts and other interested persons setting a hearing to consider the trustee's petition for January 8, 1973.

The bankrupts, in response to the court's December 26, 1972 Notice, filed directly with the District Court in San Francisco, California, their motions for a Temporary Restraining Order and a Preliminary Injunction to restrain the January 8, 1973 hearing before the trial court. The District Court by and through the Honorable Spencer Williams, a United States District Court Judge, refused to issue a preliminary injunction and the trustee's petition came on for hearing before the trial court January 18, 1973.

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At the hearing the court gave the trustee authority to sell the property subject to confirmation by the court. Robert B. Gibson & Associates bid $1,000,000.00 for the property and Coastal Properties Association bid approximately $1,100,000.00 but conditioned its bid upon its being able to find financing for the purchase.

Bankrupts objected to the $1,000,000.00 offer and Franklin V. C. Jones testified about all the other possible "deals" concerning the property that he had in the fire. The bankrupts had Frank E. Gross, a "loan broker", testify that if given another thirty days that the bankrupt could obtain a one million dollar loan to refinance all the property.

The trustee requested that the court confirm the unconditional $1,000,000.00 offer because of the pendency of the petition for reclamation and the uncertainty of its outcome. The bankrupts, through their attorney, requested that the matter be continued for another thirty days because if the other bid was firmed up the bankrupts would stand to receive another $100,000.00. Bankruptcy Judge Brown, after carefully weighing the possible ramifications of his ruling granted the bankrupts' request for a continuance and in so doing stated:

> It's extremely difficult to make a determination because you've got to worry in a situation of this type if there is any continuance as to whether or not you lose a bidder. We only have one, and we have nothing on the other side except hopes, the kind of hopes that we have been considering ever since we started this matter, but I think there is

> a sufficient difference between the low appraisal and the high appraisal in the bids that we have and the secured interests in this property to indicate to me that there can be no serious damage done to the secured creditors and no damage at all can be done to the unsecured creditors so far as I can see, and there is the barest possibility that by being too hasty we might have some damage to the bankrupts in this case.
>
> I'm going to have to risk delay. . . . Perhaps contingencies can be turned into firm offers and perhaps other offers can be raised and perhaps the nebulous possibility of borrowing money can happen. I don't know, but I'm going to give it until February 14, at 10:00 a.m. here to find out and we'll keep our fingers crossed.

The continuance was granted over the objection of the major secured creditor.

All matters came on for further hearing before the trial court on February 14, 1973, and the first thing done by the bankrupts was to again ask for a further continuance.

Again the bankrupt Franklin V. C. Jones testified that he had a million dollar loan pending but didn't know with whom.

The bankrupts' attorney next objected to the sufficiency of the advertisement placed by the trustee regarding the sale, but upon hearing the explanation of the trustee, withdrew his objection and stated, "that's satisfactory".

The Court, after again listening to the bankrupts' request, refused further continuances and stated that:

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> I was convinced that I should continue it for one extra month to today. There has to be a termination at some point and I think this is the point.

The contingent bid of Coastal Properties Association was withdrawn and in confirming sale of the property to the other bidder the Court stated:

> I will just make the remark that you don't come up with purchasers for millions of dollars worth of property every day. It is my feeling that if there was any continuance we were liable to lose a potential purchaser who has complied with all the provisions as set forth in relation to the sale and who has been inconvenienced for some period of time because of what I feel are more or less unavoidable delays.
>
> If we were to lose this particular purchaser, it might be years, really, before we could get some other purchaser. We have had nothing but speculation and we had this contingency bid and we have nothing that will tell us that somebody might not make a larger bid. We also had the nebulous idea that there might be a possibility for Mr. Jones to obtain other financing, but he has delayed some of the creditors on what they have a right to have by the State Court actions and the earlier Chapter XII actions and the current bankruptcy petitions. . . .

The trial court signed and filed its written order on February 27, 1973, entitled "Order Confirming Sale of Real Property" whereby the property was sold to Robert B. Gibson and Associates and/or Cold Creek Land and Cattle Corporation.

The bankrupts timely filed their Petition for Review of the said February 27, 1973, order. The matter came on for hearing before the Honorable Robert F. Peckham, United States District Court Judge, and Judge Peckham on July 26, 1973, filed his order reversing the order of Judge Brown.

Cold Creek Land and Cattle Co., petitioner, on August 3, 1973, filed its motion with the District Court requesting reconsideration of the July 26, 1973, order of Judge Peckham, and the Court on December 28, 1973, filed its Memorandum and Order denying the motion for reconsideration and reaffirming its order of July 26, 1973, reversing the order confirming sale.

Appeal to the Court of Appeals for the Ninth Circuit followed and that Court on April 17, 1975, entered its order affirming the decision of reversal by the District Court.

QUESTIONS PRESENTED

1. Is a bankrupt a "person aggrieved" within the context of §39c of the *Bankruptcy Act,* thus giving the bankrupt standing to petition for review of an order confirming sale of real property?

2. Can a District Court on appeal of an order confirming sale of property in a bankruptcy proceeding, reverse the order of confirmation on a finding of inadequacy of price and inadequacy of notice in connection with the sale?

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REASONS FOR GRANTING A WRIT

A. SUMMARY OF REASONS.

The paramount reason for granting a Writ of Certiorari on the issue of the standing of the bankrupts to appeal from an order confirming sale is that the decision rendered by the Court of Appeals for the Ninth Circuit is in conflict with the decision of the Court of Appeals for the Fifth Circuit in the case of *Imperial Bowl of Miami, Inc., v. Roemelmeyer,* 368 F.2d 323 (5th Cir., 1966).

The paramount reason for granting a Writ of Certiorari regarding the standard to be applied by a District Court in reviewing on appeal the confirmation of a sale of property is that the decision rendered by the Court of Appeals for the Ninth Circuit holding that insufficient notice of sale and inadequacy of the sum bid are grounds for reversal is in conflict with various decisions of the Courts of Appeals for the Third, Seventh, Eighth, and Tenth Circuits, which courts have held that neither inadequacy of price, nor offers of better prices, nor anything but fraud, accident, mistake, or some other cause for which equity would avoid a like sale between private parties, will warrant a court in avoiding the confirmation of the sale. *In re Marathon Foundry & Machine Company,* 239 F.2d 122 (7th Cir., 1956), cert. den. 350 U.S. 1014, 100 L.Ed. 874; *Morrison v. Burnette,* 154 F. 617, (8th Cir., 1907); *J. J. Sugarman Co. v. Davis,* 203 F.2d 931 (10th Cir., 1953); *In re Stanley Engineering Corp.,* 164 F.2d 316 (3rd Cir., 1947); and, *Smith v. Juhan,* 311 F.2d 670 (10th Cir., 1962).

In addition, this case raises important questions of interpretation of the *Bankruptcy Act* which are of a reoccurring nature, to wit: Is the bankrupt a "person aggrieved" by an order confirming sale of property and what is the standard to be used by appellate courts in passing upon the propriety of a sale of property in a bankruptcy proceeding.

B. THE DECISION RENDERED BY THE COURT OF APPEALS FOR THE NINTH CIRCUIT IS IN CONFLICT WITH THE DECISION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT AND IMPERIAL BOWL OF MIAMI, INC. v. ROEMELMEYER, 368 F.2d 323 (5th Cir., 1966).

In *Imperial Bowl,* supra, the Fifth Circuit held that a bankrupt is not a "person aggrieved" by a referee's order confirming a sale of property in a bankruptcy proceeding. The Ninth Circuit in the case at bench held that the determination of whether a bankrupt is a "person aggrieved" within the meaning of §39c of the *Bankruptcy Act* is essentially a question of fact and that when it appears that a surplus returnable to the bankrupts will be generated from a sale of property the bankrupts might well be considered "persons aggrieved" and that as a consequence of the factual character of the determination, the determination by the lower court will not be overturned unless clearly erroneous. (Appendix "B")

It is respectfully submitted that the Ninth Circuit's characterization of the determination as being essentially one of fact finding is erroneous and that the determination is more appropriately one of law within

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the context of a sale of property in a straight bankruptcy proceeding.

A bankrupt, if a "person aggrieved", may petition for review of an order of the referee under §39c of the *Bankruptcy Act*, 11 U.S.C. §67c, which provides in part relevant the following:

> A person aggrieved by an Order of a Referee may, within ten days after the entry thereof or within such extended time as the court upon petition filed within such ten day period may for cause shown allow, file with the Referee a petition for review of such Order by a Judge and serve a copy of such petition upon the adverse parties who are represented at the hearing. Such petition shall set forth the order complained of and the alleged errors in respect thereto.

The Ninth Circuit in reaching its determination in this matter failed to see the difference between a party aggrieved and a party in interest under the Bankruptcy Act. The general rule set forth in numerous cases is that a bankrupt is not an aggrieved party with rights of review because his adjudication as a bankrupt absolves him of liability and he has no interest in the distribution of his estate because his non-exempt property has passed to the Trustee in Bankruptcy by operation of law pursuant to the provisions of §70a of the Bankruptcy Act. *Caldwell v. Armstrong*, 342 F.2d 485, 488 (10th Cir., 1965); *Edell v. DiPiazza*, 345 F.2d 336, 337 (5th Cir., 1965).

The requirement that a bankrupt be "aggrieved" to petition for review of an Order is in contrast to the provision which allows an "interested party" to ob-

ject to the allowance of a claim. Thus, a bankrupt, as a "party in interest", may object to allowance of a claim under §57(d) of the *Bankruptcy Act*, 11 U.S.C. §93(d), which provides:

> Claims which have been duly proved shall be allowed upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest or unless their consideration be continued for cause by the court upon its own motion.

A "party in interest" may be a bankrupt who may get a potential surplus if a claim is disallowed.

Although the cases are sometimes cited interchangeably as support for both situations, the cases allowing review where there is a possibility of a surplus are grounded on §57(d) of the Bankruptcy Act allowing a "party in interest" to object to allowance of a claim. *In re Woodmar Realty*, 241 F.2d 768, 770-772 (7th Cir., 1957); *In re Povill*, 105 F.2d 157, 159 (2nd Cir., 1939); *In re Hopkins*, 15 F.2d 206 (D.C. R. I. 1926). Cases allowing review when there is a possibility of personal liability of a bankrupt are grounded on §39c of the Bankruptcy Act which requires an "aggrieved" status. In the cases of *Caldwell v. Armstrong*, 342 F.2d 485, 488-489 (10th Cir., 1965) and *Menich v. Hoffman*, 205 F.2d 365, 367, 368 (4th Cir., 1953), the orders would have resulted in the bankrupt having a tax liability after bankruptcy. In each of these latter cited cases enforcement of the order would have necessarily resulted in liability, a positive adverse obligation, an increased burden after bankruptcy.

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The different standards are reflected in the specific wording of the sections.

Section 57(d) refers to "parties in interest". Webster's New International Dictionary (1961) defines "interest" as a "right, title or legal share in something, participation in advantage, profit and responsibility". A bankrupt who may receive a surplus may be a "party in interest". He would be one who would be participating in the advantage and profit. Therefore, he would be interested. Such interest gives a bankrupt standing to object to an allowance under §57(d) of the Act.

Section 39(c) refers to "person aggrieved". Webster's New International Dictionary (1961) defines "aggrieved" as "showing grief, injury or offense, having a grievance; *specific:* suffering from an infringement or denial of legal rights". This is a different standard than mere interest. It requires a positive harm, the loss of something the person already has or has a right to have; therefore, something more than dashed hopes. In other words, a bankrupt is aggrieved when, as a direct result of the order, he would be left with a personal liability after bankruptcy something which positively injures him and something the Bankruptcy Act intends him to be free of.

There is a good reason for different standards for petitions to review orders of the Referee from those for objections to the allowance of claims. The Bankruptcy Act has two goals: to free the debtor of debts and to protect the creditors as much as possible. Con-

gress has seen fit to allow the bankrupt in situations to object to the allowance of a claim. This makes sense. True, the bankrupt has no legal right to a surplus, but he does have an interest in getting one. Objections by the bankrupt to the allowance of a claim can do no harm to the creditors as a group. If he succeeds in getting the claim disallowed, the creditors as a whole are better off. If he fails, the creditors are no worse off than they were originally. Therefore, in the claim situation, the goals of the Bankruptcy Act are satisfied and the bankrupt may get the advantage of the surplus.

On the other hand, reversal of an order may result in harm to the creditor group. The area of objections to the allowance of claims—where the creditors will not be harmed—is covered by §57(d). Section 39(c) is different. In order to attain the goals of the Bankruptcy Act, however, a petition to review the Referee's order pursuant to §39(c), can be allowed only when the bankrupt is truly aggrieved or when no harm can possibly be inflicted on the creditor group. In the case at bench, the bankrupt certainly has a potential surplus after the payment of all creditors' claims but he has no legal right and does not occupy the status of an aggrieved person to interfere with the liquidation of his assets with the principal end being the payment of creditors' claims. To allow the bankrupt to thwart the disposition of his assets is tantamount to saying that he may exercise the same prerogatives in a straight bankruptcy proceeding as he could have in a Chapter XII proceeding or in a state court proceeding where he was restraining his

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secured creditors from foreclosing on security interest in his assets without any of the duties of putting up indemnity bonds or any other adequate security as required in the normal course of events. The goals of the Bankruptcy Act which are to free the debtor of debts and to protect the creditors as much as possible are certainly compromised when the debtor is allowed to dictate to the creditors the mode and means in which his property which has passed to the Trustee in Bankruptcy shall be disposed of.

Additionally the standard set forth by the Ninth Circuit in the case at bench is difficult to apply. Its elements only allow for a case by case determination and as such really does not establish a standard of predictability. But more importantly, it totally rejects or at least does not consider the rights of the bankrupt's creditors to be quickly paid from a liquidation of the bankrupt's non-exempt assets. It does not consider the economic reality that creditors of bankrupts usually are debtors of third persons and that creditors not receiving payment on their claims as quickly as possible can be necessarily converted into bankrupts themselves. The bankruptcy law from the standpoint of the bankrupt is primarily designed to give him a fresh start in life, free from the burden of old debts and the price extracted for this benefit is the requirement that the bankrupt turn over his non-exempt assets for the benefit of his creditors. The formula proposed by the court below gives the bankrupt all the benefits of a fresh start and none of its detriments—he obtains a discharge from his debts and still exerts a substantial proprietary inter-

est in his assets; the court's formula does not give the bankrupt a fresh start but rather a head start in that his creditors can take no action to be paid and he can pursue asset liquidation for the best price possible without the bother and/or burden of timely debt servicing.

It is respectfully submitted that straight bankruptcy proceedings were not designed to be used as vehicles for a debt moratorium which seems to be the main purpose in the bankrupt's activities in the case at bench.

C. THE STANDARD ENUNCIATED IN THE DECISION BY THE COURT OF APPEALS FOR THE NINTH CIRCUIT FOR REVIEWING THE PROPRIETIES OF SALE OF PROPERTY IN BANKRUPTCY PROCEEDINGS IS IN APPARENT CONFLICT WITH THE DECISIONS OF THE COURTS OF APPEALS FOR VARIOUS OTHER CIRCUITS.

Preliminarily it is submitted that the District Court's holding in the case at bench that the sale price of the property in question was insufficient and that the Referee's finding to the contrary was "clearly erroneous" is insupportable. Rule 810 of the Rules of Bankruptcy Procedure provides the following:

> Upon an appeal the district court may affirm, modify, or reverse a referee's judgment or order, or remand with instructions for further proceedings. The court shall accept the referee's findings of fact unless they are clearly erroneous, and shall give due regard to the opportunity of the referee to judge the credibility of the witnesses.

The referee in the bankruptcy in the case at bench specifically found that "in relationship to the two appraisals and the two bids the purchase price is rea-

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sonable bearing in mind that one appraisal is for $745,000.00 and the other for a distressed price of $1,380,000.00."

The District Court on review made the following findings:

> Under the circumstances presented by the record herein, it appears indisputable that the notice of the sale was insufficient, and that this in turn produced a sale price which was grossly inadequate. For these reasons, the Referee's findings must be reversed as clearly erroneous, and the sale must be vacated.

It is extremely difficult to grasp the District Court's determination in any other fashion except as one wherein it is exercising its independent determination as to what should have happened before the Referee. The bid for the property in question was one million dollars, which was a sum falling closely between the two appraisals, and in light of the appraisals it seems clear that the District Court was in error in holding that the Referee's finding as to reasonableness of price was clearly erroneous.

The court's analysis of the advertising accompanying the sale entirely overlooks the fact that the attorney for the bankrupt at the sale hearing on February 14, 1973, after first objecting to the insufficiency of the advertising waived his objection and stated, "that's satisfactory". This is especially true in light of the fact that an irregularity in a bankruptcy sale can be waived. 4A *Collier on Bankruptcy,* 14th Edition, paragraph 70.98, page 1152.

But assuming that the District Court on review had the power under the facts of this case to hold that the findings were "clearly erroneous", such a holding still would not have allowed or permitted a reversal of the referee's order confirming sale. The court in the case of *In Re Marathon Foundry & Machine Company,* 239 F.2d 122 (7th Cir., 1956), cert. den. 350 U.S. 1014, 100 L.Ed. 874, was presented with the factual situation where the petitioner contended in a bankruptcy sale context that a confirmed judicial sale may be set aside for "gross inadequacy of price", or for "gross inadequacy of price" coupled with "other circumstances. The other "circumstances" in that case was that the sale was inadequately advertised. A contention likewise made by the bankrupts in this matter. The Court in rejecting the contention held that a judicial sale cannot be set aside for gross inadequacy of price alone or for gross inadequacy of price coupled with other circumstances, absent fraud or mistake. This holding is particularly applicable to the facts in the case at bench because the bankrupts' attorney agreed before the bankruptcy referee that the advertisement given in connection with this sale was satisfactory. The Court in the case of *Morrison v. Burnette,* 154 F. 617, at 624 (8th Cir., 1907) stated that:

> The rule is settled, and it seems to be universally approved, that after confirmation of a judicial sale neither inadequacy of price, nor offers of better prices, nor anything but fraud, accident, mistake, or some other cause for which equity would avoid a like sale between private parties,

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will warrant a court in avoiding the confirmation of the sale.

Similar holdings have been made by the Courts in the cases of *J. J. Sugarman Co. v. Davis,* 203 F.2d 931 (10th Cir., 1953); *In Re Stanley Engineering Corp.,* 164 F.2d 316 (3rd Cir., 1947); and *Smith v. Juhan,* 311 F.2d 670, at 672 (10th Cir., 1962).

The standard enunciated in these decisions appears to be in direct conflict with the standards enunciated by the Ninth Circuit Court of Appeals in the case at bench where it held that the District Court on review had the power to set aside a confirmation of a sale on the grounds that the notice of sale was insufficient and the sum bid was inadequate.

CONCLUSION

For the foregoing reasons, and because the questions raised are of a recurring nature in bankruptcy proceedings, the Petition for a Writ of Certiorari should be granted.

Dated, Oakland, California,
June 17, 1975.

Respectfully submitted,
LYNN ANDERSON KOLLER,
Counsel for Petitioner
Cold Creek Land and Cattle Co.

(Appendices Follow)

Appendix "A"

In the United States District Court for the Northern District of California

Nos. 1-72-500, 1-72-501

In the matter of
Franklin V. C. Jones and Marion Jones, his wife,
bankrupts.

[Filed Jul 26, 1973]

ORDER GRANTING PETITION FOR REVIEW, REVERSING ORDER CONFIRMING SALE, AND REMANDING PROCEEDINGS TO REFEREE

At San Francisco, In Said District, On This 25th Day of July, 1973.

This matter came to be heard before the undersigned Judge of the above-entitled Court on the 26th day of June, 1973, upon the Bankrupts' Petition for Review of an order of the Honorable Conley S. Brown, Referee in Bankruptcy, dated February 27, 1973, confirming the sale of the bankrupts' real property interests for the gross sum of $971,440.00. The Bankrupts appeared by and through their counsel, McKenzie and Maggini, by Gordon McKenzie, Esq., and Charles P. de la Forest, Esq., and Anthony Castanares, a member of Quittner, Stutman, Treistor &

Glatt Professional Corporation. The Trustee appeared by and through counsel, Philip M. Arnot, Esq.

The Court having read and filed the Petition for Review, the Referee's Certificate, and the briefs submitted by the parties; having heard the arguments of counsel; it appearing to the satisfaction of the Court that the bankrupts have standing to petition for review of the order at issue herein; it appearing that the record before the Court is not sufficient to permit affirmance of said order in that notice of the sale, and the price accepted therefore were inadequate; and good cause appearing therefore, it is

ORDERED, that the Referee's Order of February 27, 1973, confirming a sale of the Bankrupts' property be and it hereby is reversed; and it is further

ORDERED, that this matter is hereby remanded to the Referee for further proceedings not inconsistent herewith; and it is further

ORDERED, that if the Trustee proposes to conduct another sale, said sale shall be conducted in such a manner, including sufficiency of notice and advertising exposure, as to constitute a commercially reasonable disposition of the subject property calculated to obtain the highest price obtainable for same.

Dated: Jul 26 1973

/s/ Robert F. Peckham
District Judge

In the United States District Court
Northern District of California

Nos. BK 1-72-500, 1-72-501 RFP

In the matter of
Franklin V. C. Jones and
Marion Jones,
Bankrupts.

[Filed Dec. 28, 1973]

MEMORANDUM AND ORDER

This matter came on for hearing on November 9, 1973, upon a Motion for Reconsideration filed by Cold Creek Land & Cattle Co. as purchaser of certain real property, requesting reconsideration of the court's order of July 26, 1973, vacating the Referee's order confirming the sale of said real property.

Cold Creek seeks reconsideration on the twin grounds that the bankrupt is not a "person aggrieved" within the meaning of the Bankruptcy Act, and hence not entitled to seek review of the Referee's orders, and that even gross inadequacy of price due to inadequate notice of sale is not a sufficient ground for setting aside an order of the Referee.

On the standing issue, Cold Creek relies primarily upon *Skelton v. Clements,* 408 F.2d 353 (9th Cir. 1969), and *In re Longtin,* 303 F.Supp. 1342 (E.D.

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Cal. 1969). Both cases are cited for the broad proposition that a bankrupt is not a "person aggrieved" by any order of the Referee relating to the disposition of the bankrupt's property. However, upon examination, neither these cases themselves nor the cases upon which they rely are directly controlling. Both of the above-cited cases involved challenges by the bankrupt to the settlement of legal claims contained in the bankrupt estate. The bankrupt in *Longtin* had submitted affidavits by experienced antitrust attorneys stating that the claims were settled for a mere fraction of their true value, and that they would have brought a substantially greater recovery had they gone to trial. Nevertheless, common sense and judicial experience suggest that any estimate of the value of a claim or of the amount it would bring at trial is at best a matter of considerable speculation and uncertainty. To allow a bankrupt to challenge a settlement on the mere hope that harder bargaining or actual trial would bring a greater recovery would hopelessly prolong bankruptcy proceedings. The instant case, on the other hand, concerns the value of a parcel of real property, an item subject to far more precise valuation than a mere legal claim. The only independent appraisal in the record indicated a distress sale value substantially greater than that which was actually received by the trustee, and it is undisputed that, since even the actual sale price far exceeded the sum of the creditors' claims, any surplus realized over the actual sale price would be recovered by the bankrupts. In contrast, while *Longtin* involved a claim by the

bankrupt that he would have recovered a surplus if the full value of his claim had been realized, no such allegation was present in *Skelton;* and of the two cases cited in *Skelton* as authority for the proposition that the bankrupt is not an aggrieved person, one involved an acknowledged "hopeless bankrupt" who would not, under any circumstances, have received any surplus from the estate (*Harman Corporation of America v. United States,* 304 F.2d 429 (8th Cir. 1962)), and the other, like *Skelton,* made no reference to any possibility of surplus inuring to the bankrupt (*Castaner v. Mora,* 216 F.2d 189 (1st Cir. 1954)). *Skelton v. Clements, supra,* 408 F.2d at 354.

Under these circumstances, where the only independent appraisal in the record suggests that the lowest realistic estimate of the value of the property greatly exceeded the value actually recovered, where the property is of a type generally susceptible of reasonably precise valuation, and where it is undisputed that the bankrupt would be entitled to receive, as surplus, any amounts recovered in excess of the sale price, this court holds that the bankrupt must be recognized as a "person aggrieved" within the meaning of the Bankruptcy Act and must be granted standing to challenge the Referee's orders by which he is aggrieved. Such a holding need not, as the *Longtin* court feared, endlessly prolong and complicate the bankruptcy proceedings; where the challenge involves real property rather than a mere legal claim, the actual value of the property may be ascertained with reasonable certainty and may be realized with

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reasonable speed, since a good faith effort to sell, with adequate notice, should have no difficulty in generating an offer approximating the fair distress value of the property as independently ascertained.

As to the issue of whether a sale may be set aside for gross inadequacy of price, Cold Creek has cited a number of cases from other circuits holding that once the Referee has approved a sale, it may not be overturned except for mistake or fraud. Nevertheless, the only Ninth Circuit case which has been cited to the court, *Procter & Gamble Mfg. Co. v. Metcalf*, 173 F.2d 207 (9th Cir. 1949), deals with the issue as follows:

> Many opinions use language which indicates that a sale confirmed cannot be set aside for inadequate consideration alone. [Citation] But there are often other compelling reasons for the actual holding. For instance, the appeal of an unsuccessful bidder for relief from a confirmed sale to another is open to the obvious objection that such a bidder has no interest. [Citation] Furthermore, where the District Judge presides and himself approves and confirms a sale, there is good reason to say he should not be permitted to change his mind unless fraud is present. [Citation] But where review has been taken from the order of the referee, reversal thereof by the District Judge leaves the prospective purchaser in the same situation as if the referee had refused confirmation. [Citation] Where there are even slight circumstances which suggest that there is unfairness to the estate in bankruptcy, a careful consideration should be had on review and a confirmed sale should be set aside if necessary to rectify the

> situation. While, if referee and District Judge agree, an appellate court will rarely interfere, the District Judge has the responsibility to see that a sale which leaves the estate unprotected should not be confirmed.

173 F.2d at 209 (footnotes omitted). The quoted language appears to remain good law in this Circuit, and happily accords with this court's own view of its function in such a situation.

Under the circumstances presented by the record herein, it appears indisputable that the notice of the sale was insufficient, and that this in turn produced a sale price which was grossly inadequate. For these reasons, the Referee's findings must be reversed as being clearly erroneous, and the sale must be vacated.

Accordingly, the motion for reconsideration is hereby denied, and the matter is remanded to the Referee for further proceedings consistent with this Memorandum and Order and with the Order of July 26, 1973.

So ordered.

Dated: December 27, 1973

/s/ Robert F. Peckham
United States District Judge

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Appendix "B"

DO NOT PUBLISH

United States Court of Appeals
for the Ninth Circuit

No. 74-1593

In the Matter of Franklin V. C. Jones and Marion Jones,
Bankrupts.

Cold Creek Land and Cattle Co.,
Petitioner-Appellant,
vs.
Franklin V. C. Jones and Marion Jones,
Respondents-Appellees.

[April 17, 1975]

Appeal from the United States District Court
for the Northern District of California

MEMORANDUM

Before: KOELSCH and TRASK, Circuit Judges, and MURPHY,* District Judge.

The purchaser at a bankruptcy trustee's sale appeals from the district court's order setting aside the sale

*The Honorable Thomas F. Murphy, Senior United States District Judge for the Southern District of New York, sitting by designation.

on the ground that the notice of sale was insufficient and the sum bid was inadequate. The district court did not err. *See In re Time Sales Finance Corporation,* 445 F.2d 385 (3d Cir. 1971); *Proctor & Gamble Mfg. Co. v. Metcalf,* 173 F.2d 207, 209 (9th Cir. 1949); *Allen v. Union Transfer Co.,* 152 F.2d 633, 635 (10th Cir. 1945). Hence we look to the pivotal question—whether the bankrupts had standing under §39(c) of the Bankruptcy Act, 11 U.S.C. §67(c), to petition for review of the referee's order confirming the sale.

The determination whether a bankrupt is a "party aggrieved" within the meaning of §39(c) of the Act is essentially a question of fact. *See Marks v. Brucker,* 434 F.2d 897, 899-900 (9th Cir. 1970); *Menick v. Hoffman,* 205 F.2d 365, 367-368 (9th Cir. 1953). And here, where it appears that a liquidation sale will probably result in a sizeable surplus in the bankruptcy estate payable to the bankrupts, we cannot say that the district court's finding—that the bankrupts were "parties aggrieved" by the order confirming the sale—was clearly erroneous.

AFFIRMED.

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